CRIMINAL APPEAL NO. 373 OF 1987.

with

CRIMINAL APPEAL NO.483 OF 1987.

Date of decision: 12.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Criminal Appeal No.373 of 1987

Mr. Nitin M. Amin, advocate for appellants.
Mr. K.P. Raval, A.P.P. for respondent.

Criminal Appeal No.483 of 1987.

Mr. K.P. Raval, A.P.P. for appellant.
Respondent-served and released on bail.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 12, 1996.

Oral judgment (Per Jain, J.)

Initially, three accused, i.e., two appellants in Criminal Appeal No.373 of 1987 and respondent in Criminal Appeal No.483 of 1987, were tried by the learned Additional Sessions Judge, Kheda at Nadiad, in Sessions Case No.221 of 1986 for commission of offence punishable under Sections 302, 201, 34 and 120-B of the Indian Penal Code read with Section 135 of the Bombay Police Act. Vide judgment and order dated 15.4.1987 Rameshbhai Dahyabhai Patel and Vinodbhai Manusing Rajput, accused Nos.1 and 2 respectively/ the appellants in Criminal Appeal No.373 of 1987 were convicted for the offence under Section 302 read with Section 201 of Indian Penal Code and sentenced to rigorous imprisonment for life whereas having found no reliable evidence against accused No.3, i.e., Dahiben Dahyabhai, respondent in Criminal Appeal No.483 of 1987, was acquitted. Aggrieved by the order of conviction passed both the accused Nos.1 and 2, preferred Criminal Appeal No.373 of 1987 whereas the State preferred Criminal Appeal No.483 of 1987 against the order of acquittal passed in favour of accused No.3. Since both these appeals are arising from the same judgment, are disposed of by this common judgment.

Before we could proceed on merits, Mr. Amin has invited our attention that respondent in Criminal Appeal No.483 of 1987 has already died on 17.11.1995. He has also produced death certificate dated 18.11.1995 issued by Talati-cum-Mantri, Taluka Motera, Gandhinagar, as an evidence about death of Dahiben Dahyabhai, the respondent. Mr. Raval, learned A.P.P., has not challenged this fact. In view of this, we hold that the appeal preferred by the State, that is, Criminal Appeal No.483 of 1987 abates as the respondent/original accused No.3 has already expired during pendency of this appeal. Death certificate dated 18.11.1995 is taken on record and appeal is disposed of accordingly.

Looking to the evidence on record, Mr. Amin, learned advocate for the appellants, has argued that the complained act was not committed with intention of causing death and, therefore, case would be covered under Section 304 instead of Section 302 of IPC and prays for alteration of sentence accordingly. We have been taken through the evidence and we find that this is a case of circumstantial evidence only. The evidence of P.W.4, Shardaben Kantilal, Ex.51 and P.W.5, Razakbhai, Ex.32 as

well as that of P.W.7, Kaushikbhai Ramanlal Shah, Ex.34, would be material evidence to hold that both the appellants as well as the deceased were last seen together and at that time the deceased Suresh was alive. To fortify this conclusion, we are also influenced by the evidence of P.W.6, Nirmalsinh, Ex.33. In para 3 of his evidence, this witness states that some days after the date of offence, the appellant No.1 had contacted and met him in his office and had made a voluntary statement that on the relevant day and time they all were together. This statement of the accused before this witness is nothing else but confessional statement, that is, extra judicial confession and can be relied against the accused by prosecution, that is, the circumstance that all were last seen together. Of course, the witness has also stated that appellant No.1 did tell him that the deceased Suresh had died but his statement is not clear about involvement of the accused in killing the deceased, therefore, this would be a weak piece of evidence in the nature of extra judicial confession to rope in the accused in actual commission of offence. However, this would be strong evidence to hold that the accused knew about the death of the deceased and, therefore, to that extent the statement in the nature of extra judicial confession made by accused No.1 in presence of P.W.6, Nirmalsinh, can be relied upon. We have no hesitation in saying and holding that the statement in the nature of extra judicial confession made by accused No.1 was free, voluntary and without any force or coercion and, therefore, the statement can very well be put under the caption of 'extra judicial confession' and can be used in evidence against the accused. Of course, it has come on record that before the accused made statement in presence of P.W.6, one or two slaps were given by P.W.6 but then it is amply clear from the evidence that this had been done in presence and at the behest of father of accused and, therefore, Nirmalsinh can be deemed to have acted in quasi parental capacity and if with a view to get information or clear picture of the events one or two slaps are given by parental authority or quasi parental authority, this may not be termed as force, coercion or under compulsion. In this view of fact, we hold that the statement made by accused No.1 in presence of P.W.6 is nothing else but extra judicial confession and can be relied against accused.

Thus, the statement in the nature of extra judicial confession discussed above is a strong piece of evidence to hold that the accused had knowledge about the death of deceased Suresh. When the accused were last seen together with the deceased, who is now no more, and when

the accused are having knowledge about death of deceased, the circumstance under which death occurred has to be satisfactorily explained by the accused. The accused have no satisfactory answer. This circumstance, appreciated in light of evidence of P.W.9, Mafatlal, Ex.38, and P.W.11, Shantaben, Ex.40, that is, parents of deceased, as well as evidence of P.W.15, Sudhakar, Ex.49, Investigating Officer, go to show that it is the accused only and none else are involved in committing death of deceased. It has also become amply clear from the record that the betrothal of deceased with Bhagwatiben, that is, sister-in-law of accused No.1 was not liked and approved by him and his mother and by hook or crook they wanted the same to be broken. It has also come on record that many a times prior to the incident, the accused No.1 as well as his mother had also threatened the deceased or his parents to break betrothal. This evidence appreciated in its proper perspective would go to show that the accused wanted to deal with the deceased in such a manner, that on his own he may not be agreeable for his betrothal with Bhagwatiben. It is in this background and motive that the deceased was shown to be in their company and gone to Bochasan.

As a cardinal rule, evidence of prosecution must always be corroborated by medical evidence and especially qua injuries and cause of death. In this case, the doctor has been examined as P.W.3, at Ex.14. Dr. R.D. Purani, P.W.3, also carried out post-mortem examination. The post-mortem report is placed at Ex.14. The doctor has stated that shock as a result of profuse bleeding owing to fracture of 4th and 5th cervical vertebra is the cause of death. In para 4 he has categorically stated that such injuries can be the result of stick blow given with force on the cervical vertebral region. But he is silent on the question whether such injury in ordinary course of nature, can result into death. In cross-examination, the witness has admitted that mere fracture of 4th and 5th cervical vertebra may not sufficient to cause death in ordinary course of nature. With this medical evidence we are unable to accept the case of prosecution that the injuries sustained by the deceased is the direct cause of death. This evidence appreciated in light of motive which led the accused to take the ill-advised step would make clear about the intention and knowledge. By this time looking to the evidence on record we are clear in our mind that the accused did not have intention to cause death or cause such bodily injury which may result into death but had intention to create such a situation whereby the deceased may retract and may not accept betrothal with Bhagwatiben and with this intention the

accused had given fatal blow with stick. While inflicting fatal blow, may be that the accused were having knowledge about the blow resulting into death, but, nonetheless intention. If this is so, the case in hand may not be a case of culpable homicide amounting to murder since the whole act sans intention. Thus, from the evidence placed before us it is clear that the fatal blow was given by the accused without intention of causing death. It is true, when the accused gave this fatal blow at the cervical vertebra region, so-called vital part, may be having knowledge that such blow may result into death. Consequently, the accused cannot be convicted for offence punishable under Section 302 of IPC. In our view, the case is squarely covered under Section 304 Part II of IPC. Hence, conviction and sentence passed against the appellants under Section 302 of IPC deserves to be quashed and set aside and be punished under Section 304 Part II of IPC.

Mr. Amin, learned advocate for the appellants, has also invited our attention to a decision of the Supreme Court in the case of Ramaotar v. State of M.P. reported in AIR 1993 SC 302. In that case, death was caused by lathi blow inflicted by accused on head and ribs of the deceased, who intercepted during the fight between two groups. The accused also received lathi blows and injuries at the hands of son of deceased in that fight. It was held that the lathi blows were given in the course of fight between two groups without having any intention of causing death and, therefore, the sentence and conviction passed under Section 302 was altered to Section 304 of IPC. In our view, the view taken down by the Supreme Court squarely covers the case in hand as discussed hereinabove and, therefore, while quashing order of sentence under Section 302 passed by the learned trial Judge, we hereby convict the appellants for the offence under Section 304 Part II of IPC.

We are informed that the accused are in jail since 6.8.1986 and by this time they have already undergone imprisonment for nine years and six months approximately. In our view, sentence undergone till date is sufficient and adequate for the offence under Section 304 Part II of IPC. As regards the charge under Section 201 of IPC. Mr. Amin has not been able to point out any material from record which is amenable to any two views as regards commission of offence. Therefore, there is no alternative but to uphold conviction under Section 201 of IPC. Thus, the accused Nos.1 and 2/appellants are held guilty for offence under Section 304 Part II read with Section 201 of the IPC. We, therefore, pass the

following order;

The sentence and conviction passed by the learned Additional Sessions Judge under Section 302 of IPC is quashed and set aside. The appellants are held guilty for offence under Section 304 Part II read with Section 201 of IPC. The accused Nos.1 and 2/appellants are convicted under Section 304 Part II of IPC and sentenced to undergo rigorous imprisonment for the period which they have already undergone by this time. No separate sentence is passed under Section 201 of IPC. Consequently, the accused Nos.1 and 2/appellants are ordered to be set free forthwith if not required in connection with any other case. Accordingly, Criminal Appeal No.373 of 1987 is allowed partly & Criminal Appeal No.483 of 1987 stands disposed of as abated.